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Sentencing Issues: A Summary

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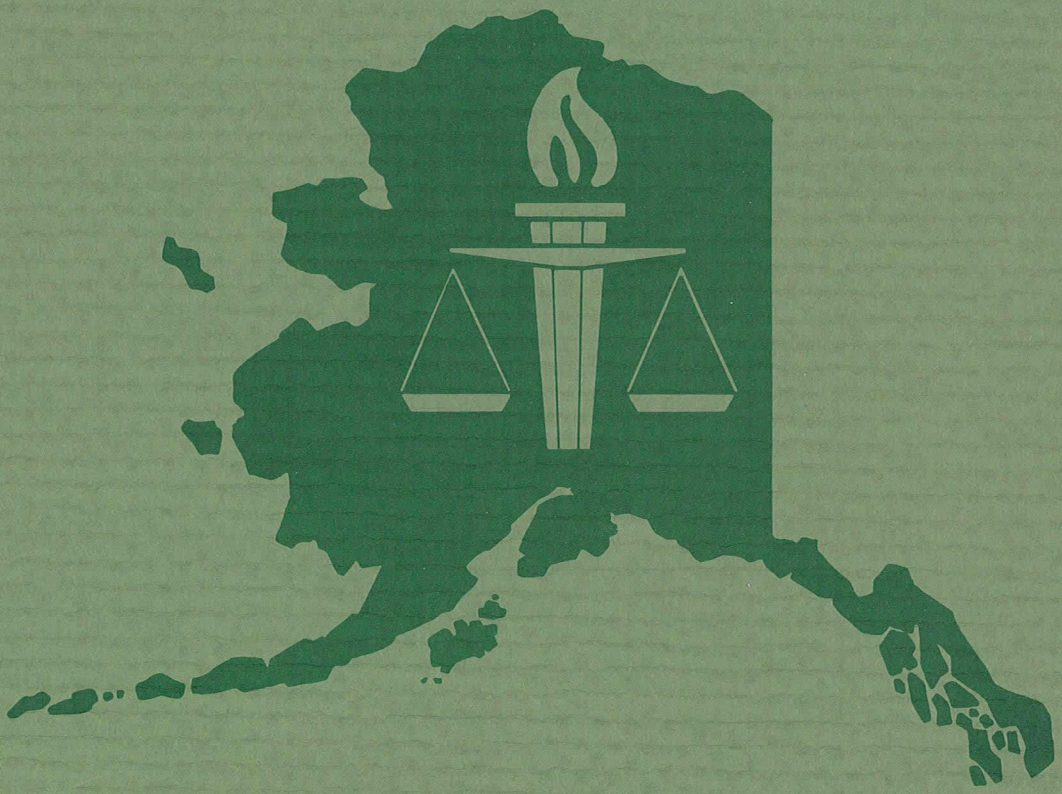
Summary

This report contains three summaries prepared as an introduction for members of the Alaska Legislature to criminal sentencing issues: (1) A paper on presumptive sentencing reviews the study "Fair and Certain Punishment: Report of the Twentieth Century Fund Task Force on Criminal Sentencing" (McGraw-Hill, 1976), and presents a guide for legislative action prior to the enactment of a presumptive sentencing system. (2) A report on sentencing standards in Alaska presents excerpts from Alaska Supreme Court Justice Robert C. Erwin's article "Five Years of Sentence Review in Alaska" (5 U.C.L.A. Law Review 1 (1975)). (3) A final paper, "An Introduction to Basic Sentencing Issues" – an edited version of a memorandum by Jerold Israel of University of Michigan Law School, discusses a series of proposals that acknowledged experts have advanced concerning the reform of the laws governing sentencing.

SENTENCING ISSUES:

A SUMMARY



THE CRIMINAL JUSTICE CENTER

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SENTENCING ISSUES:

A SUMMARY

PREPARED BY THE

CRIMINAL JUSTICE CENTER

UNIVERSITY OF ALASKA, ANCHORAGE

FOR

MEMBERS OF

THE ALASKA LEGISLATURE

February, 1977

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Introduction

This summary contains three summaries each of which deal with sentencing in criminal cases. The first, dealing with presumptive sentencing, was written by the editor of this summary. The second focuses on past sentencing practices in Alaska from the view of an Associate Justice of the State Supreme Court, while the third looks at the overall picture in sentencing from a national perspective.

These summaries are designed to provide members of the Legislature with a reasonably comprehensive but brief introduction to issues attendant to sentencing so that they may be better equipped to deal with legislative proposals on the subject which will be before them in this session.

The Criminal Justice Center's staff is prepared to respond in greater detail to specific inquiries from individual members of the House or Senate.

REPORT ON PRESUMPTIVE SENTENCING

Several members of the Criminal Code Revision Commission, at its January meeting in Juneau, asked for more information on the concept of presumptive sentencing. Staff has reviewed Fair and Certain Punishment*, the study which, in 1976, introduced the concept of presumptive sentencing to a wider audience.

In very brief terms, Fair and Certain Punishment is a significant contribution to the literature on sentencing. It is worthy of the most serious consideration by all Commission members, legislators, criminal justice practitioners and concerned members of the public. It presents an excellent picture of current sentencing practices across the country and of the serious problems associated with those practices.

The Task Force deals quite fairly with these problems and presents a brief but extremely thorough discussion of a number of proposed alternatives to current sentencing practices - including mandatory minimums - all of which it found to be less than satisfactory.

Because of the special concern of the Commission on the matter of mandatory minimums, the comments of the Task Force on that subject are quoted here in full:

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*Report of the Twentieth Century Fund, Task Force on Criminal Sentencing. McGraw Hill, (1976). Because of an embargo on substantial quotation from the report prior to its April 13, 1976 release date, staff was unable to provide this report in a more timely fashion.

"Flat-time sentencing goes too far in eliminating all flexibility. By requiring every single defendant convicted under the same statute to serve the identical sentence, it threatens to create a system so automatic that it may operate in practice like a poorly programmed robot. This is especially true if statutory definitions of crime remain as broad and inclusive as they are today.

These same objections apply substantially to mandatory minimum sentences for most crimes. We agree that there are certain extremely serious crimes for which imprisonment should be required without regard to the circumstances. (Our own recommendations make provision for such imprisonment.) But we reject the concept of the mandatory minimum as a general approach to sentencing. Moreover, we have concluded that a mandatory minimum sentencing structure, even if it were desirable, only addresses a small part of the critical problem of disparity and extremes in sentencing. It deals only with minimum sentences - not with the major injustices at the high end of the range.

It is our considered view that some degree of flexibility must be maintained both at the sentencing and the parole stage in order for the system to be just and effective. We have also concluded that discretion cannot be significantly reduced or controlled without thoroughgoing legislative (or legislatively authorized) redefinition and subcategorization of current crimes."*

The Task Force went on to recommend its own solution to the problem - presumptive sentencing. This system would require substantial code revision (at least for sentencing purposes) which would allow criminal conduct to be divided into a large number of categories depending upon the circumstances of the crime. This significantly greater particularization of criminal conduct would make it unnecessary to give a judge as much latitude in

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* Id., pp. 17, 18. (Emphasis in the original.)

sentencing since the legislature would have anticipated many of the variations which go into leniency or severity in sentencing through its codification efforts.

The present discretion of judges and parole boards would be guided by a presumptive sentence for each established criminal circumstance, the type of crime having been refined by the introduction of a large number of degrees within each crime. The court would justify departure from that presumptive sentence through a calculus of certain designated mitigating or aggravating circumstances. A similar calculus would be used for second or subsequent offenders.

To implement the system the Task Force recommended:

> "For each subcategory of crime, we propose that the legislature, or a body it designates, adopt a presumptive sentence that should generally be imposed on typical first offenders who have committed the crime in the typical fashion."*
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> * * *
>
> "The Task Force recommends that the legislature, or a body it designates, also define specific aggravating or mitigating factors again based on frequently recurring characteristics of the crime and the criminal."**
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> * * *
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> "The Task Force believes that sentencing hearings should be mandatory to establish any aggravating or mitigating circumstances and to have the sentence pronounced."***
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> * * *
>
> "We recommend that the legislature establish a commission composed of representatives of the judiciary

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*Id., p. 20.
**Id., p. 20.
***Id., p. 21.

and other interested groups to undertake the drafting, establishment, and periodic review of a presumptive sentencing system."*

* * *

"We recommend that there should be periodic review of crime categories; of minimum, maximum, and presumptive sentences; and of mitigating and aggravating factors."**

* * *

"We recommend that more imaginative approaches be taken to sentencing by imposing punishment that mitigates the crime breeding effects of today's prisons."***

* * *

"We recommend the elimination of most current barriers to employment of ex-convicts."****

* * *

"We urge that, in general, presumptive sentences be accompanied by a considerable reduction in the lengths of sentences authorized by legislatures, imposed by courts, and served by prisoners. It is also our recommendation that a larger number of criminal defendants - principally those convicted of serious crimes - should serve some time in prison."*****

Each of these recommendations was accompanied by detailed commentary which outlined the Task Force's rationales and what they believed would be accomplished in a positive fashion by implementation. Their commentary touched on substantially all of the issues which the Criminal Code Revision Commission has considered in its discussions relating to substantive code revision of terms of sentence and factors related to sentencing.

The Task Force then presented an illustrative presumptive

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*Id., pp. 25, 26.
**Id., p. 28.
***Id., p. 28.
****Id., p. 29.
*****Id., p. 32

sentencing sentencing statute for armed robbery, and a further list of illustrative crimes and presumptive sentences. They took great pain to point out that these were illustrations of the system and not recommendations supported by the entire Task Force.

The report concluded with an excellent background paper by Professor Alan M. Dershowitz of the Harvard Law School. This paper deals with a variety of issues related to sentencing and treats all of them in a comprehensive yet easily read and understood fashion.

As is made clear by the recommendations of the Task Force, legislative enactment of a presumptive sentencing system for Alaska would require a great deal more research and analytical work beyong that provided by the Task Force's recommendations. It is of considerable significance to the Alaska Commission that such a system does not require a legislative basis. It could be implemented through the judicial power without specific legislative sanction, a course deserving careful consideration by its avoidance of adding further complexity to the work of code revision.

The Study justified non-legislative implementation as follows:

> "Except for the proposed curtailment of the power of parole boards and prison administrators, federal, state, and local court systems need not wait for legislative action to establish a system of presumptive sentences. Courts are administrative agencies in fact if not design; as Professor

> Kenneth Culp Davis notes, 'Earlier and more diligent use of agencies' rule-making power is a far more promising means of confining excessive discretionary power than urging legislative bodies to enact more meaningful standards.' Since 'power to make rules always accompanies discretionary power and need not be separately converred,' presumptive sentences for each crime, as well as the weights to be attached to prior convictions and to mitigating and aggravating circumstances, can be promulgated by courts in the form of administrative rules and guidelines. (See Kenneth Culp Davis, Discretionary Justice [Baton Rouge, La.: Louisiana State University Press, 1969], ch. 3, esp. pp. 56, 68.)"*

Thus, at least two avenues are open to arriving at implementation of a presumptive sentencing system. Of the two, the latter - court promulgated administrative rules and guidelines - presents a number of advantages over legislative enactment.

It provides the ability to experiment on the utility of presumptive sentencing in connection with a limited number of crimes without encountering the difficulties inherent in drafting, introducing and gaining passage of new legislation. Moreover, if the system develops unforeseen problems it can be revised or abandoned altogether in a much easier fashion than is required for statutory enactments.

Taking the Task Force's recommendations as a guide for legislative action, the following work would be required before a presumptive sentencing system could be enacted.

1) Substantive crimes would have to be broken down

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*Id., p. 20. (The language is contained in a comment to the text by Mr. Charles Silberman, a New York author and member of the Task Force.)

into subcategories which reflected degrees of severity. In part, we are engaged in this process already in our Code revision work. It should be noted, however, that the Commission has been resistant to a large number of subcategorizations and that, though a high degree of subdivisions may be useful to sentencing, it may well pose problems for the prosecution.

2) Terms of sentence for each subcategory of crime would have to be established for the presumptive sentence and a formula developed for dealing with repeaters and aggravating and mitigating circumstances.

These terms and their accompanying formulae could be developed through the process of group discussion and legislative compromise. Or, they could be arrived at by the process of research. Given the significance of the end product to the administration of justice, the latter seems to be the preferred course of action.

An a priori sentencing model could be constructed by random sampling of all cases involving the crime in question over a period of time to determine what Alaska's judges have given the average first time offender convicted for that crime. A similar process would be used for second, third, etc. offenders. The results of this research would provide "real" sentencing parameters within which questions related to presumptive sentences could be addressed. This research would

tend to indicate why the Task Force calls for a continuing process of review. Changes in community attitude and social conditions have a good deal to do with actual sentencing practices.

3) The same research is required on issues of mitigation and aggravation. Exhaustive "laundry" lists could be developed based on the experience of practitioner recollections, or case files could be surveyed to develop real lists of typical aggravating and mitigating circumstances which recur with some frequency in Alaska's environment.

The research involved in items (2) and (3), above, would require considerable time and effort, but it may be essential in a system where fairness is to be first subject to mechanical screening.

SENTENCING STANDARDS IN ALASKA

(NOTE: The material which follows has been excerpted from an article written by Supreme Court Justice Robert C. Erwin [entitled: "Five Years of Sentence Review in Alaska"], which appeared in 5 U.C.L.A.-Alaska L. Rev. 1 (1975).)

The Supreme Court has defined four overreaching goals of sentence review:

> "(i) to correct the sentence which is excessive in length, having regard to the nature of the offense, the character of the offender, and the protection of the public interest;
>
> (ii) to facilitate the rehabilitation of the offender by affording him an opportunity to assert grievances he may have regarding his sentence;
>
> (iii) to promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process; and
>
> (iv) to promote the development and application of criteria for sentencing which are both rational and just.

In addition, the court specified objectives which inhere in the Alaska Constitution's mandate that "[p]enal administration shall be based on the principle of reformation and upon the need for protecting the public":

> Within the ambit of this constitutional phraseology are found the objectives of rehabilitation of the offender into a non-criminal member of society, isolation of the offender from society to prevent criminal conduct during the period of confinement, deterrence of the offender himself after his release from confinement or other penological treatment, as well as deterrence to other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender, or in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves."[1]

After reviewing a number of sentence appeal cases involving homicides and other crimes against people, Justice Erwin notes:

> "These cases suggest that in the court's view the violent criminal conduct which causes injury to an innocent victim

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[1] Erwin, "Five Years of Sentence Review," 5 U.C.L.A.-Alaska L. Rev. 1,2(1975); citing State v. Chaney, 477 P2d 441 (Alaska 1970). (Footnotes omitted.)

should be dealt with firmly, and that the protection of society and the affirmation of societal norms should be primary criteria for sentencing in this area. Such a view was confirmed in the case of Ames v. State in which the Alaska Supreme Court specifically stated:

> This court has previously expressed the view that violent crimes involving physical injury to innocent people are to be regarded as our most serious offenses and are not to be treated lightly. . . ."[2]

Justice Erwin then addressed sentencing of drug offenders. He noted that in Waters v. State[3] the Supreme Court, for purposes of analysis, divided drug offenses into four degrees of culpability.

> "1. Smuggling or sale of large quantities of narcotics of possession of large quantities for sale.
>
> 2. Smuggling or sale of small quantities of narcotics or possession of small quantities for sale.
>
> 3. Possession of narcotics without intent to sell.
>
> 4. Marijuana offenses.

The court reminded the trial courts that these categories are important factors in the determination of the sentence:

> We think these categories are relevant in sentencing of drug offenders. From the record it seems that appellant is neither a titan of the narcotics business nor a mere user; he seems to be an occasional retailer. In sentencing it should be remembered that the maximum sentence for a particular offense expresses a legislative judgment about how the worst offender within a class designated by the legislature should be treated. Here there is an absence of foundation for characterization of the appellant as the worst type of drug offender."[4]

Continuing his review of sentencing drug offenders, Justice Erwin observed that:

> "The Waters case may be read as standing for three basic propositions. First, in a drug case, it is appropriate for the court on review to undertake a somewhat thorough canvass of the background, age, and particular circumstances of the defendant;

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[2] Erwin, supra. at 7, (footnotes omitted).

[3] 483 P2d 199 (Alaska 1971).

[4] Erwin, supra. at 89, (footnote omitted).

these considerations loom larger than in the areas of violent crime discussed above. Secondly, incarceration for a substantial period for a single violation will generally be inappropriate, unless the offender falls squarely within the worst category, e.g., a large-scale wholesaler. Finally, a course of drug related criminal conduct, as evidenced by other convictions, may aggravate the seriousness of the drug charge itself."[5]

Crimes involving property were also considered by Justice Erwin. With respect to this group he made the following observations:

"A substantial number of sentence appeal cases have arisen in the area of crimes involving property. These are roughly divisible for purposes of analysis into crimes of stealth, such as burglary, larceny or forgery, and crimes in which weapons are employed, such as robbery and perhaps arson.

A review of these cases indicates that age, background, and previous criminal history play a more significant part in determining the proper sentence than in those cases in which physical injury to the victim is involved. In this area the court has referred to the standards of the American Bar Association, in stating the sentences in excess of five years should be restri - ted to those cases clearly appropriate by virtue of background."[6]

* * *

"Robbery involves somewhat different considerations, given its higher potential for injury. The court has affirmed substantial sentences where violence has actually occurred or where life has been endangered, or where prior convictions indicate that "less stern measures have proven unsuccessful." Nonetheless, the opinions evidence a willingness to take a hard look at the age, background and psychiatric profile of the individual offender, and it cannot be said that the court considers the possibility of sentence relief to be automatically foreclosed in the robbery area. However, it would appear appropriate to take into consideration the potential injury to the victim in arriving at a proper sentence. Certainly, the use of weapons aggravates the nature of the crime."[7]

Before concluding his review of sentence appeals Justice Erwin dealt with one other class of offenders worthy of some attention: repeat offenders. As to their sentencing he observed:

"One further special sentencing problem, which has been mentioned in other sections but which may deserve scrutiny in

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[5] Id, pp. 9, 10.

[6] Id, p. 12 (footnote omitted).

[7] Id, p. 13 (footnote omitted).

isolation, is that of the repeated offender. In a number of per curiam opinions the court summarily approved long-term sentences for recidivists, evidencing a recognition that the incidence of repeated offenses greatly enhances the likelihood of continued antisocial behavior and the concomitant need to protect society therefrom."[8]

Justice Erwin's concluding remarks merit serious consideration and are presented hereafter in toto:

"Given the small number of sentences reversed as excessive over the past five years, can it be said that sentence appeals in Alaska have been a waste of time for the court or an exercise in futility for defendants? The answer must surely be no. A brief review of the expectations enunciated in Chaney provides a standard by which to judge success or failure.

"At the heart of sentence appeal is a developed commitment to justice for the offender, and thus the correction of an excessive sentence in a particular case. A re-reading of those cases in which relief has been granted leaves one with a sense that the Alaska Supreme Court was on solid ground, and confirms that a dispassionate appellate perspective is required. Perhaps some cases have been presented without sufficiently thoughtful examination of the defendant's background, his value to our society or the presence of mitigating circumstances (or at least without sufficient articulation of those factors); the supreme court, like all courts, must take care that classifications devised to stimulate thought do not curtail it. On the other hand, it must be remembered that, as a practical matter, the trial court is the principal repository of justice in a criminal case. The "clearly mistaken" standard assures that if the supreme court errs, it will err in favor of the trial court's discretion. Given the inherent limitations of appellate review, no other course is feasible.

"The other side of the coin of justice to the offender is justice to the community. Three times the court has disapproved lenient sentences, expressing a sense of outrage toward the gratuitous violence shown by the record. Many times it has affirmed lengthy sentences which reflect the trial judge's willingness to be severe if necessary. Early criticisms that judicial initiative would be stifled and that judges leery of reversal would seek the apparent safety of middle range sentences, have not come true. Thus it does not appear that the community has been ill-served by sentence appeal due to half-hearted vindications of societal norms.

"Finally, has sentence appeal promoted development of rational, just and humane sentencing criteria? The supreme court seems to have made progress in this area. Arguably some standards such as the rule against consideration of police "contacts" or unverified allegations, or the need for psychiatric data, could have been promulgated absent the sentence

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[8] Id, p. 18.

appeal legislation. Other doctrines - the notion that only hardcore defendants should be visited with maximum sentences, the adoption of the ABA's five year sentence guideline, the expression of the need for firmness to counter violence - clearly derive from the sentence review authority vested in the court by the legislature, and might not otherwise have been promulgated.

"Whether the rules developed in the cases are wise is a matter for individual judgment. In any event, the job of devising rational standards is far from complete, and will never be finished as long as community standards and perceptions continue to evolve. But the need for a central arbiter of those values in criminal cases, within the sentencing parameters set by the legislature, has been convincingly demonstrated. The cases show that manifest unfairness has led to reversal in a few cases; the appearance of unfairness has been alleviated in others; and, hopefully, unfairness has been prevented in numerous cases due to the guidance afforded by the Alaska Supreme Court's sentence appeal decisions."[9]

A cursory review of cases involving sentence appeals heard by the Supreme Court since Justice Erwin's article appeared revealed no significant departures from the standards enunciated in the article.

A comparison of the sentencing standards and guidelines established by the Alaska Supreme Court in the course of its sentence reviews with factors considered to be either aggravating or mitigating in nature under a presumptive sentencing scheme suggests a considerable amount of similarity. Thus, the legislature may wish to consider sentencing criteria set forth in Alaska case law should it decide to pursue a presumptive sentencing bill.

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[9] Id, pp. 20, 21.

NOTE: This is a heavily edited version of a memorandum written by Professor Jerold Israel of the University of Michigan Law School. Professor Israel has given permission to reproduce the memorandum. The editing was done by the Staff of the Criminal Justice Center and was designed to reduce the number of references to the various studies which were included in the original. In addition, appendices contained in the original have been omitted.

AN INTRODUCTION TO BASIC SENTENCING ISSUES

This memorandum discusses a series of proposals, advanced by generally acknowledged "experts," concerning the reform of the laws governing sentencing. Among the proposals considered are those advanced by the following groups, whose titles are too long to bear repeating in full throughout the text: American Bar Association (A.B.A. Standards), the National Council on Crime and Delinquency (Model Sentencing Act), the American Law Institute (Model Penal Code), the 1967 President's Commission on Law Enforcement and Administration of Justice (President's Commission), the 1973 National Advisory Commission on Criminal Justice Standards and Goals (N.A.C.), the National Commission on Reform of Federal Criminal Laws, Working Paper Report by Peter Low (Low Study), and the Twentieth Century Fund: Task Force Report on Criminal Sentencing (20th Century). The memorandum is devoted to proposals relating to the use and allocation of sentencing authority rather than to procedure utilized in exercising that authority.

LIMITED GRADES OF CRIMES

First, it is recommended that the range of available sentences be reduced to several set categories, typically classified by letter (e.g., class A felony, class B felony, class C felony, etc.). The advantages of this approach, adopted in all of the recent codes modeled after the Model Penal Code, are noted in the Low Study:

> There is a consensus among recent Code Reform efforts that the best way to avoid inconsistencies of penalty structure . . . is to systematize the sentencing provisions in a separate part of the Code by the use of sentencing categories which are intended to represent the entire spectrum of punishment that is to be available for crime. Such an approach has the effect of creating an internally consistent, carefully thought-out penalty structure which not only will assist the rationalization of penalties provided for presently existing offenses, but which also will help to assure that new offenses can be integrated into the existing structure in a manner consistent with what is already on the books. . . .

EMPHASIS UPON ALTERNATIVES TO IMPRISONMENT

Another generally accepted recommendation is that the emphasis in sentencing should be upon alternatives to imprisonment. That is, fines and community based treatments, like probation, where reasonably applicable, should be preferred to imprisonment. In support of restricting the

use of imprisonments, Professor Norval Morris, in The Future of Imprisonment, stresses that "parsimony in the use of imprisonment" follows from the basic moral and utilitarian functions of imprisonment:

> The least restrictive -- least punitive -- sanction necessary to achieve defined social purposes should be chosen. . . . [Accordingly,] a presumption in favor of punishment less severe than imprisonment pervades all recent scholarship and most legislative reforms. This principle is utilitarian and humanitarian; its justification is somewhat obvious since any punitive suffering beyond societal need is, in this context, what defines cruelty. . . . The draftsmen of the American Law Institute's Model Penal Code sought to capture this principle of parsimony in imprisonment in the phraseology of that code's main article on sentencing. Section 7.01 is entitled 'Criteria for Withholding Sentence of Imprisonment . . .' and the section directs the court to order other punishments unless 'imprisonment is necessary for protection of the public.'

MANDATORY IMPRISONMENT

Some experts argue that guidelines, such as those suggested by the Model Penal Code or Professor Morris, are inadequate because they still permit too much judicial leeway. What is needed, they argue, is greater certainty of imprisonment for serious crimes. The best approach here, they argue, is requiring imprisonment for certain crimes. In some instances,

the proposals do not require that the imprisonment be for any specified term beyond the minimum sentence that is administratively feasible in a particular jurisdiction (ordinarily one year). In other proposals, it is suggested that there should be a mandatory minimum of a specified period (e.g., 2, 3, or 4 years). This approach was recently supported by President Ford in his crime message:

> Imprisonment too seldom follows conviction for a felony. In the 1960's crime rates went higher, but the number of criminals in prison, state and federal, actually went down. * * * There should be no doubt in the minds of those who commit violent crimes -- especially crimes involving harm to others -- that they will be sent to prison if convicted under legal processes that are fair, prompt and certain.

Consider also the following comments of Professor James Q. Wilson in Thinking About Crime:

> [O]ne way of defining a good sentence is to say it is that disposition that minimizes the chance of a given offender's repeating his crime. Under that definition, we would not only expect but want disparities in sentences -- one armed robber getting five years in prison and another getting probation -- provided only that we had good reason to believe that each sentence was appropriate to each criminal's prospects for rehabilitation. On the other hand, if we believe that a good sentence is one which deters others from committing a crime, then we might wish to impose the same penalty on persons with very different prospects for rehabilitation, and to make that penalty sufficiently severe to discourage potential criminals, especially those who believe they might be regarded as good bets for rehabilitative -- which is to say, lenient -- treatment.

Compare, however, the following comments in mandatory minimums in the Low Study:

> Two related arguments are typically advanced in support of legislatively mandated sentences. The first is that a mandatory sentence is necessary in some instances to assure that the courts will not deal too leniently with a particular offender. The second is that the certainty of substantial punishment for the violation of a particular statute will act as a significant deterrent to the commission of that offense.
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> Neither argument, however, is persuasive. In the first place, there is clear evidence as a practical matter that the system does not function as the arguments would envisage. As is explored in part I of this memorandum, there is not certainty of punishment for Federal narcotics offenders [notice the standing mandatory sentences], nor are the courts prevented from dealing leniently with an offender if that is their desire.
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> There are affirmative disadvantages to such sentences as well. In some instances, a mandatory sentence results, as a practical matter, in a vesting of sentencing authority in the invisible and uncontrollable discretion of the prosecutor, perhaps the least desirable place for such authority to repose. There are always alternative offenses which could be charged. .

Opponents of mandatory sentencing provisions have raised, in addition to the arguments noted in the Low Study, the question as to whether the "taxpayers [r]eally are willing to bear the momentary costs of a mandatory sentencing program?" It is noted that the prisons currently are almost at capacity, and considerable costs would be entailed in building new prisons. It has been suggested that the public must be

willing to commit "substantial additional resources for prisons, courts and prosecutors -- in many states perhaps even doubling or tripling the capacity of the criminal justice system -- [or such] sentencing reforms (mandatory minimums) will be a disaster, if not a joke." (Wall Street Journal, 624, 1976.)

DETERMINING THE LENGTH OF SENTENCE: INDETERMINATE SENTENCE

The Nature of Indeterminate Sentencing

Prison sentences for felony offenses typically are of the "indeterminate" variety. That is, there is a significant gap between the maximum sentence that may be served and the minimum that must be served. Thus, a person will be sentenced to imprisonment for a term of from one-to-five or three-to-ten years. Even life sentences often are indeterminate because state law will provide that a "lifer" may be paroled after serving a specified sentence (e.g., 10 years). (This does not apply to "mandatory life sentences," usually reserved for homicide.)

The maximum sentence that may be imposed always is established by statute. In some jurisdictions, the judge may set an outer-limit for the indeterminate sentence that is less than that allowed by statute. In others, the maximum set by statute applies as the outer-limit in all cases. Those favoring automatic application for the statutory maximum in all cases argue that there is no way a judge can be certain in advance that the progress of the prisoner will justify his release at an earlier point than the maximum authorized by law. Those favoring granting the judge discretion to reduce the maximum argue that the judge may find that the crime committed, under the facts of the case, does not justify the full range of the sentence considered by the legislature, which must set the maximum with the most serious variety of the particular crime in mind.

Ordinarily, minimum sentences are not prescribed by law but left to the judge's discretion -- except that the minimum cannot be so close to the maximum as to eliminate the concept of indeterminancy. Thus, typically the minimum is limited by law to no more than 1/3 or 1/2 of the maximum. Some judges frown upon imposing minimums in any case except a special situation where a "warning to others" is needed. These judges ordinarily will impose the lowest sentence that is administratively feasible (e.g., 1 year) as the minimum sentence. Others frequently impose a minimum that is close to the maximum percentage permitted by law.

OBJECTIONS TO INDETERMINATE SENTENCING

Disparity

A major objection to current indeterminate sentencing is that it grants the court far too much discretion, even if one accepts the value of a certain degree of indeterminancy. Consider, for example, a situation where the statute sets a maximum of 10 years and the court has the authority to reduce the maximum by half in the individual case and to set a minimum up to 1/2 of the maximum given in the case. One defendant convicted of the offense may be sentenced to 5-10 years, while the other may receive 1-5 years. Moreover, even where the maximum imposed must be that set by statute, and the discretionary minimum is limited to 1/3 of the maximum, there is a substantial difference, it is argued, between a sentence of 1 to 10 years and 3 1/3 to 10 years. While parole releases ordinarily coming in the range of two years where the board is not restricted by a lengthier minimum, the second defendant may serve almost twice as long as the first.

LENGTH OF SENTENCE

Some persons, though accepting the concept of indeterminate sentences generally argued that the quest for indeterminancy does not justify the high maximum sentences authorized under typical American statutes. They argue that maximum terms should be limited to a shorter period, perhaps five years, with longer terms provided only for especially dangerous offenders through extended term sentencing provisions. The rationale supporting this proposal is noted in the N.A.C. report, which recommends that "state penal code revisions should include a provision that the maximum sentence for any offender not specifically found to represent a substantial danger to others should not exceed five years for felonies other than murder." The study report notes:

> It is well-documented and almost universally recognized that the sentences imposed in the United States are the highest in the western world. This results from a number of factors including the high maximum sentences authorized by statutory provisions. To be assured that the very dangerous offender is incapacitated, legislatures in effect have increased the possible maximum sentence for all offenders. This dragnet approach often results in imposition of a high maximum sentence on persons for whom it is patently excessive. The wide flexibility exacerbates the disparities in sentencing that seriously handicap correctional programs.

The President's Commission . . . reported in 1967 that more than one-half of all persons confined in state prisons in 1960 had been sentenced to maximum terms of at least ten years. But of those released in that year the average length of time actually served in confinement was less than two years, and only 8.7% had actually served five years or more.[11] Lowering the authorized maximum term will not unduly restrict the court's discretion as it affects the length of time actually served in prisons. It will, however, reduce the excessively long sentences served by some offenders for whom such sentences are inappropriate. It also will diminish disparate treatment of similarly situated offenders.

[Professor Israel concluded his discussion of basic sentencing issues with a discussion of presumptive sentencing. Because a separate memorandum from the Center has addressed that issue, it has been omitted herein.]

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[11] A subsequent study, showing sentence and actual time served by first releases from state correctional institutions in 1970, was consistent. Thus, in most of the jurisdictions examined, more than 50% of the persons sentenced received terms in excess of 5 years, with over 90% actually serving less than 5 years. In Tennessee, for example, 62% were sentenced to terms of 5 years or less, 20% to terms of 10 years or less and 18% to terms in excess of 10 years. Actual time spent was less than 5 years for 90%, less than 10 years for an additional 8 1/2%, and more than 10 years for only 1 1/2%. Only one of the jurisdictions cited in the study had more than 5% serving in excess of 10 years.